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No. 91-1992

# In the Supreme Court of the United States

OCTOBER TERM, 1992

MICHAEL FIGURES, ET AL., APPELLANTS

*v.*

GUY HUNT, GOVERNOR OF ALABAMA, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## QUESTION PRESENTED

Whether the district court abused its discretion when it denied appellants' motion under Fed. R. Civ. P. 60(b) to modify a court-ordered congressional redistricting plan in light of objections by the Attorney General of the United States to a separate, but similar, plan adopted by the State of Alabama and submitted for preclearance under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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### STATEMENT

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

1. The Alabama Legislature adjourned on July 29, 1991, without passing a congressional redistricting plan. As a result, the redistricting plan enacted in 1981 in response to the 1980 census was left in place. J.S. App. 137a, 140a. The 1990 census did not require any change in the number of districts created under the 1981 plan. The 1990 census did, however, show that some of the seven existing congressional districts deviated from the "ideal" population required for population equality among the districts. Specifically, the 1990 census re-

vealed that the most populous district varied from the ideal population by 4.59% and that the least populous district varied from the ideal population by 7.71%. J.S. App. 137a-138a. The 1990 census also indicated that 25.26% of Alabama's population is black, and that 22.73% of its voting-age population is black. Nonetheless, blacks did not constitute a majority in any of the districts created under the 1981 plan, and no black has been elected to Congress from Alabama since the Reconstruction era. J.S. App. 138a, 163a, 169a, 217a.

2. In September 1991, plaintiff Paul Charles Wesch filed suit in the United States District Court for the Southern District of Alabama. The complaint alleged that Alabama's seven congressional districts had become malapportioned, in violation of the equal representation standard of Article I, Section 2 of the federal Constitution. J.S. App. 135a. Appellants Michael Figures and Joseph Mitchell later intervened on behalf of a proposed class of black voters and asserted claims under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973. J.S. App. 136a.

A three-judge district court was convened pursuant to 28 U.S.C. 2284(a). J.S. App. 136a. The court held that the existing plan was unconstitutional because of the population variances among the districts. The court also determined that the Alabama Legislature would not have time after it reconvened in February to enact a redistricting plan and have it precleared by the April 3, 1992, qualifying deadline for the congressional primaries. The court therefore found it necessary to draw its own redistricting plan. J.S. App. 5a, 140a-141a, 146a.

The parties proposed six plans that the court considered in a two-day trial in January 1992. Only two of the plans, the Reed Plan and the Pierce Plan, achieved population equality among the districts. J.S. App. 142a. Five of the six plans contemplated one majority black district.

The remaining plan (the Hilliard Plan), which was initially proposed by appellants, had two majority black districts. Appellants later conceded, however, that the Hilliard Plan "probably provided obstacles of sufficient nature to cast doubt on their opportunity to elect candidates of their choice in [the two proposed majority black] districts." See J.S. App. 143a. Furthermore, appellants subsequently stipulated that "the African American population in the State of Alabama is sufficiently compact and contiguous to comprise a single member significant majority (65% or more) African American Congressional district," and that a single majority black district "should be created." Mot. to Dis. or Aff. App. A9.

Three weeks after trial, the court issued an order stating that it intended to adopt the Pierce Plan (proposed by plaintiff Wesch) with certain modifications to be made by the court-appointed statistical expert. The court's order also stated that the parties could object to the accuracy of the statistical data upon which the expert relied. *Wesch* v. *Hunt*, No. 91-0787 (S.D. Ala. Jan. 27, 1992); J.S. App. 137a.

Four days before judgment was entered, the Alabama Legislature adopted a redistricting plan. The Legislature's plan differed from the plans submitted to the court, but, like those plans, it provided for only one majority black district. J.S. App. 142a. The next day, the State filed a motion with the district court seeking leave to use the Legislature's plan, rather than the modified Pierce Plan that the court had said it would adopt, for the 1992 congressional primary elections.

3. In a judgment entered on March 9, 1992, the district court denied the State's motion to use the Legislature's plan on the ground that that plan had not been precleared under Section 5 of the Voting Rights Act of 1965, 42

U.S.C. 1973c. J.S. App. 150a-152a.[1] Consistent with its January order, the district court adopted a plan similar to the Pierce Plan. J.S. App. 149a-150a. The court-ordered plan provides population equality and one majority black district with a voting-age population that is 63.58% black. J.S. App. 143a. The court stated that, in light of the parties' stipulation that a single majority black district should be created, it was unnecessary "to decide whether the creation of a majority African-American district is mandated by either § 2 or the Constitution and as a matter of judicial restraint [the court] d[id] not undertake to do so." J.S. App. 149a.

Because the April 3 qualifying deadline for the June 2, 1992, congressional primaries was imminent, the court ordered that its plan be used for the 1992 congressional elections unless the Legislature's plan was precleared by March 27, 1992. J.S. App. 5a-6a, 151a-154a. The court also ordered that its plan be used for all subsequent congressional elections until the Legislature enacts a plan that achieves Section 5 preclearance. J.S. App. 5a-6a, 154a.

4. The State submitted its redistricting plan to the United States Department of Justice for preclearance pursuant to Section 5 on March 11, 1992. J.S. App. 222a. At the same time, the State requested preclearance of a change in the qualifying deadline for congressional primaries from April 3, 1992, to May 4, 1992. J.S. App. 176a.

After expedited consideration, on March 27, 1992, the Attorney General, through the Assistant Attorney General for Civil Rights, precleared the postponement of the

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[1] On March 27, 1992, this Court denied the State's motion for a stay of the district court's order of March 9, 1992. *Camp* v. *Wesch*, 112 S. Ct. 1551 (1992). On May 18, 1992, the Court affirmed the district court's order denying the State's motion for leave to use the Legislature's plan for the 1992 elections. *Camp* v. *Wesch*, 112 S. Ct. 1926 (1992).

qualifying deadline but objected to the Legislature's redistricting plan. J.S. App. 222a. The Attorney General's objection was based on his determination that the State had not shown that its plan was not adopted with a discriminatory purpose and would not have a discriminatory effect. J.S. App. 224a. In particular, the Attorney General found that the State had failed to justify the creation of only one majority black district. The Attorney General expressed concern that the creation of a single such district reflected an attempt by the State's political leadership to "limit[] black voting potential." J.S. App. 223a. The Attorney General also observed that under the State's plan, aside from the single black majority district, "the state's concentrated black population * * * is fragmented * * * among a number of districts none of which has a black population of as much as 30 percent." *Ibid.* The Attorney General noted that "at least the outlines of alternative plans that avoided such fragmentation were available or readily discernible by state officials and that such alternatives would provide for two Congressional districts with black voting age population majorities." *Ibid.*[2]

5. Upon learning that the Attorney General had not precleared the State's plan, appellants moved the district court to modify its judgment pursuant to Fed. R. Civ. P. 60(b). J.S. App. 174a-175a. Appellants argued that since the Attorney General's objection to the Legislature's plan was based on the "failure [of the plan] to create two majority black congressional districts," J.S. App. 175a, the court should schedule a hearing to consider whether

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[2] Appellants' appendix contains a typographical error on page 223a. The affected portion of the objection letter actually reads: "Our analysis further indicates that the fragmentation of black population concentrations outside of the one district with a black voting age population majority was *un*necessary" (emphasis added).

the failure of the court's plan to create two majority black districts unfairly diluted minority voting strength. J.S. App. 176a, 181a. The district court summarily denied the motion six days later. J.S. App. 184a. The court also summarily denied appellants' request to supplement the record with evidence that the court's plan impermissibly fragmented minority voting strength and that, as the Attorney General found in his objection, it is possible to create a plan with two viable majority black districts that meets the Constitution's one-person, one-vote requirement. J.S. App. 187a-189a, 221a.

**DISCUSSION**

This case presents a narrow issue: whether the district court abused its discretion when it denied appellants' motion under Fed. R. Civ. P. 60(b) to reopen the judgment ordering use of the court-adopted redistricting plan for the 1992 congressional elections. In our view, the court did not abuse its discretion in denying the motion. Prior to the judgment, appellants stipulated that a single majority black district "should be created." Mot. to Dis. or Aff. App. A9. They changed their position on that issue only when, after adoption of the court's plan, the Attorney General objected to a separate plan adopted by the Alabama Legislature. The Attorney General's objection to a state plan that was not before the court did not, however, invalidate the court-adopted plan. Nor did the objection compel the district court to reopen the judgment under Rule 60(b). The Attorney General's objection to the Legislature's plan was not tantamount to a determination that the court-adopted plan violated Section 2 of the Voting Rights Act. The objection, instead, reflected a determination that the State had failed to meet its burden of showing that the Legislature's plan was entitled to preclearance. That determination may

have justified, but it did not compel, relief under Rule 60(b).

1. Section 5 of the Voting Rights Act of 1965 prohibits Alabama, as a covered jurisdiction, from implementing "any * * * standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," unless such changes receive judicial preclearance from the United States District Court for the District of Columbia or administrative preclearance from the Attorney General. 42 U.S.C. 1973c. Preclearance is appropriate when the jurisdiction's proposed change does not have the purpose or the effect of "denying or abridging the right to vote on account of race or color, or [membership in a language minority group]." *Ibid.* Because redistricting plans are changes in voting procedures, see *McDaniel* v. *Sanchez*, 452 U.S. 130, 137-138 (1981), a State covered by Section 5 may not implement a new redistricting plan unless it proves that the plan has neither a discriminatory purpose nor a discriminatory effect.

Preclearance is required only where a "State or political subdivision" covered by Section 5 "enact[s] or seek[s] to administer" a change in election practices. 42 U.S.C. 1973c. Thus, as appellants acknowledge (J.S. 6), a "remedial directive of a federal court" that does not "reflect[] the policy choices of the elected representatives of the people" is not subject to Section 5's preclearance requirements. *McDaniel* v. *Sanchez*, 452 U.S. at 144, 153; *Connor* v. *Johnson*, 402 U.S. 690, 691 (1971) (per curiam). That conclusion fully comports with the underlying purposes of the preclearance requirement. Section 5 was enacted because some covered States "had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees," and Congress "had reason to suppose that

these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the [Voting Rights] Act itself." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 335 (1966). The aim of Section 5 is thus achieved when preclearance review is reserved for changes enacted or administered by covered jurisdictions, including changes enacted by legislatures pursuant to court orders. *McDaniel* v. *Sanchez*, 452 U.S. at 152-153.[3]

Section 5's preclearance requirement does not apply to the plan adopted by the district court in this case. The district court determined that no legislative plan could be precleared in time for the 1992 congressional primary elections. J.S. App. 140-141a, 151a. It accordingly found that "the only means by which Alabama's 1992 congressional primaries may be held in a timely manner * * * is pursuant to an interim redistricting plan ordered by this court." J.S. App. 141a. The court ultimately adopted a plan based on the Pierce Plan submitted by plaintiff, a private party. As the district court made clear, because the Pierce Plan was not formulated or proposed by a covered jurisdiction, the district court's plan did not "reflect the policy choices of the elected representatives of the people." J.S. App. 151a (citing, *inter alia*, *McDaniel* v. *Sanchez*, *supra*). The court refused to consider the plan enacted by the Legislature only days before the final judgment was entered (J.S. App. 152a-153a), and this Court upheld the district court's refusal to do so, *Camp* v. *Wesch*, 112 S. Ct. 1926 (1992).

The Attorney General's objection to the Legislature's plan did not bar the court from using its own plan.

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[3] See also 28 C.F.R. 51.18(a) (in general, "[c]hanges affecting voting that are ordered by a Federal court are subject to the preclearance requirement of section 5 to the extent that they reflect the policy choices of the submitting authority").

Instead, the Attorney General's objection prevented the State from implementing the Legislature's plan, and it prevented the court from ordering use of the Legislature's plan. This conclusion is consistent with the general principle—applicable to the more typical factual setting where the State enacts a plan to which the Attorney General objects—that the court may not order the *state* plan into effect until the Section 5 objection has been cured. See *Upham* v. *Seamon*, 456 U.S. 37, 43 (1982); *Wise* v. *Lipscomb*, 437 U.S. 535, 542 (1978). That principle reflects the court's duty to refrain from implementing a legislative plan that has not been precleared as required by Section 5.

2. Appellants moved for reconsideration pursuant to Fed. R. Civ. P. 60(b)(5) and (6). Those provisions authorize relief from a final judgment when "it is no longer equitable that the judgment should have prospective application" or for "any other reason justifying relief from the operation of the judgment." Because the district court "is in the best position to discern and assess all the facts," it "is vested with a large measure of discretion in deciding whether to grant a Rule 60(b) motion." *Twelve John Does* v. *District of Columbia*, 841 F.2d 1133, 1138 (D.C. Cir. 1988). The district court's ruling should not be disturbed in the absence of an abuse of discretion. See, *e.g.*, *Browder* v. *Director, Dep't of Corrections*, 434 U.S. 257, 263 n.7 (1978). In our view, the district court acted within its discretion in denying appellants' motion under Rule 60(b).

Rule 60(b) generally does not permit a party to relitigate an issue that was resolved in the underlying judgment. See, *e.g.*, *Ackermann* v. *United States*, 340 U.S. 193, 198 (1950); *Donovan* v. *Sovereign Sec., Ltd.*, 726 F.2d 55, 60 (2d Cir. 1984); *Merit Ins. Co.* v. *Leatherby Ins. Co.*, 714 F.2d 673, 682-683 (7th Cir.), cert. denied, 464 U.S. 1009 (1983). The threshold for challenging a judgment is

particularly high when the issue has been resolved by stipulation. *Good Luck Nursing Home, Inc.* v. *Harris*, 636 F.2d 572, 577 (D.C. Cir. 1980); see also *Allinsmith* v. *Funke*, 421 F.2d 1350, 1351 (6th Cir. 1970) (per curiam); 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2858, at 170-173 (1973). That is because the Rule was not intended to relieve a party from the consequences of tactical decisions at trial. *Ackermann*, 340 U.S. at 198; accord, *e.g.*, *Schwartz* v. *United States*, 976 F.2d 213, 218-219 (4th Cir. 1992). In particular, the use of the Rule to free a party from its prior stipulations would discourage litigants from entering into stipulations and reaching other agreements that promote an efficient use of the judicial process. Cf. *Mallory* v. *Eyrich*, 922 F.2d 1273, 1280-1281 (6th Cir. 1991) (changes in composition or political makeup of Board of Elections did not warrant Rule 60(b) relief from order entered upon State's offer of judgment admitting violation of Section 2 of Voting Rights Act).

Those principles fully apply here. In seeking relief under Rule 60(b), appellants contended that the court-adopted plan violated Section 2 of the Voting Rights Act because it created one, rather than two, majority black districts and unnecessarily fragmented the black voting population. At trial, however, appellants conceded that it "probably" was not possible to create a redistricting plan with two viable black majority districts (J.S. App. 143a), and they subsequently stipulated that only one majority black district "should be created." Mot. to Dis. or Aff. App. A9. In light of appellants' stipulation to the aspect of the judgment that they now seek to challenge, appellants were required to establish "extraordinary circumstances" for relief under Rule 60(b). See, *e.g.*, *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847, 863-864 (1988).

The Attorney General's Section 5 objection to the Legislature's plan did not constitute extraordinary circumstances compelling Rule 60(b) relief. The Attorney General determined that the State had failed to justify its failure to create two black majority districts. J.S. App. 223a-224a. While the Attorney General concluded that the State had failed to meet its burden of proof under Section 5, he also recognized that the "extreme time constraints" imposed by the court's order had "limited the state's ability to meet its burden." J.S. App. 223a. The same time constraints, the Attorney General emphasized, "necessarily * * * limited" his review of the State's submission. *Ibid.*

Thus, the Attorney General's objection did not represent a significant change in the law or the operative facts affecting the validity of the prior judgment. Cf. *System Fed'n No. 91, Railway Employes' Dep't* v. *Wright*, 364 U.S. 642, 646-653 (1961) (district court abused its discretion in refusing to modify consent decree prohibiting union-shop agreements in light of amendment to the Railway Labor Act permitting such agreements); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431 (1856); see generally *Rufo* v. *Inmates of Suffolk County Jail*, 112 S. Ct. 748, 760-764 (1992). Under these circumstances, while the district court could reasonably have reopened its judgment to consider the Attorney General's objection, the court did not abuse its discretion in declining to do so.

## CONCLUSION

The orders of the district court should be summarily affirmed.

Respectfully submitted.

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